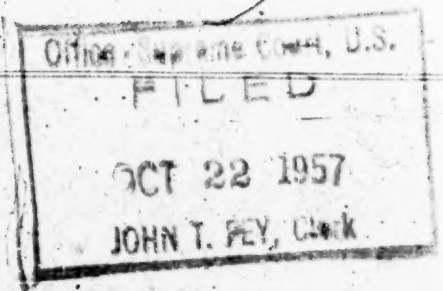


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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1957

SALVATORE BENANTI, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

Solicitor General,

RUFUS D. McLEAN,

Acting Assistant Attorney General,

JOHN F. DAVIS,

Assistant to the Solicitor General,

BEATRICE ROSENBERG,

EUGENE L. GRIMM,

Attorneys,

Department of Justice, Washington 25 D. C.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals is reported at 244 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1957 (R. 42), and a petition for rehearing was denied on June 4, 1957 (R. 48). The petition for a writ of certiorari was filed on June 28, 1957, and granted on October 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal court properly admitted evidence obtained by state officers, seeking to enforce

state law, in the course of a search resulting from a telephone conversation intercepted pursuant to a state court warrant authorized by state law.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. 605, provides:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted com-

munication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Article 1, Section 12, Constitution of the State of New York, provides in pertinent part:

* * * * *

The right of the people to be secure against unreasonable interception of telephone and telegraph communication shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. [Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.]

Section 813-a of the New York Code of Criminal Procedure provided:

Ex parte order for interception. An ex parte order for the interception of telegraphic or tele-

phonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

STATEMENT .

Following a jury trial, petitioner was convicted on a two-count indictment which charged possession of alcohol without having tax stamps affixed to the containers, and transportation of the same alcohol, in violation of 26 U. S. C. 5008 (b). (1) and 5642 (R. 3, 7, 32). Petitioner was sentenced to eighteen months' imprisonment on each count, the sentences to run concurrently (R. 32). On appeal, the convictions were affirmed.

The evidence is not in dispute (Pet. Br. 3-4) and may be summarized as follows:

The State of New York, by constitutional provision and statutory enactment, permits the interception of telephone communications where law enforcement officials first obtain a warrant authorizing the procedure. New York Constitution, Article 1, § 12; New York Code of Criminal Procedure, § 813-a, *supra*, pp. 3-4. The warrant, obtained *ex parte*, is issued only upon a showing of (1) reasonable ground to believe that evidence of crime will be obtained; (2) the purpose of interception, set out with particularity; (3) identification of the particular telephone line to be tapped and the person whose communications are to be intercepted. Applications for interception warrants may be made only by the attorney general, a district attorney, or a police officer having rank above that of sergeant. Applications may be made only to a judge of the Court of General Sessions, a County Court, or the New York Supreme Court. All of these

courts have superior criminal jurisdiction, *i. e.*, jurisdiction of the prosecution and trial of felonies.

The New York City police, believing that petitioner and his brother were violating state law by dealing in narcotics, obtained a warrant to tap the telephone of the Reno bar in New York City frequently used by the Benantis (R. 8, 11-12, 15-16). On May 10, 1956, the state police intercepted a message between petitioner and another person to the effect that "eleven pieces" were to be transported that night. Acting on this information, the police stopped a car driven by petitioner's brother, Angelo Benanti. They did not find any narcotics, but did find eleven five-gallon cans of untaxed alcohol (R. 14). Federal authorities were notified and this prosecution followed.

The fact that the search came as the result of a telephone interception was not known to federal authorities until the cross-examination of one of the New York police officers (R. 11, 29). At that point, defense counsel moved to suppress the evidence obtained by the search. The motion was denied on the grounds that no federal officer participated in the interception or the search and seizure, and that state law authorized the interception (R. 28). The Court of Appeals held that the action of the New York police was in violation of Section 605 of the Federal Communications Act which forbids wiretapping, but that the evidence obtained as a result of this interception was admissible because no federal officer had participated in either the interception or the search and seizure.

SUMMARY OF ARGUMENT

I

Whether or not the New York City police were violating Section 605 of the Communications Act when they intercepted telephone messages to and from the Reno Bar, their sole object was to enforce state law. They were not working with or for the federal officers. Only after the search of a suspected car revealed alcohol on which federal taxes had not been paid, did the possibility of federal law violations by the petitioner enter the picture. The evidence was then turned over to federal officials and this prosecution followed. But even at the time of trial the Assistant United States Attorney had no information that the evidence as to the alcohol resulted from the interception of telephone communications. This was brought out by petitioner on cross examination of one of the New York policemen. Thus, in this case, federal officials plainly had no connection with the alleged violation of Section 605 by the New York state officers.

The rule of exclusion adopted in the two *Nardone* cases, 302 U. S. 379, 308 U. S. 338, arose from this Court's determination that federal officials must not be permitted to introduce evidence resulting from their violation of Section 605 of the Communications Act. But the Court has recognized that this limitation does not apply to the introduction of such evidence in state cases. *Schwartz v. Texas*, 344 U. S. 199. On analogy to the illegal search and seizure cases, the exclusionary rule should not be applied even to trials

in federal courts where the interception was solely by state officers. Cf. *Weeks v. United States*, 232 U. S. 383; *Byars v. United States*, 273 U. S. 28; *Lustig v. United States*, 338 U. S. 74. The petitioner's attempt to distinguish the illegal seizure cases, on the ground that the giving of the testimony in court was itself a violation of Section 605 of the Communications Act (as a divulgence of the intercepted communication), has no application to this case since there was no testimony relied upon by the government at the trial which could be deemed a divulgence of the intercepted messages. Nor can the illegal search or seizure cases be distinguished on the ground that in those cases illegality cannot be attributed to state officials; this Court has authoritatively held the Fourteenth Amendment applicable to such searches. It is unconvincing to argue that the illegality arising from an infraction by state officers of the Communications Act is entitled to more protection than an infraction by state officers of the Constitution.

II

A second basis for upholding the refusal to exclude the evidence in this case is that the interception was not illegal because it was specifically covered by a court warrant issued pursuant to New York law. However, the court below held that Section 605 of the Communications Act is inconsistent with that law and, under the supremacy clause, must prevail. We believe this constitutes an unnecessarily literal reading of Section 605 and that, properly interpreted, that statute does not nullify the New York law.

The courts have often held that nullification of state laws by implying an inconsistency with federal law is to be avoided. In this field of intergovernmental relations every attempt is made to construe the statutes so that state and federal laws may both be given as nearly complete effect as is possible. On this basis, exceptions have frequently been read into general federal prohibitions in order to permit the states to enforce their local policies in their own way.

It is peculiarly appropriate that such a construction be given the Communications Act since by its terms it repeatedly recognizes that the states are not to be excluded from legislating concerning, nor from regulating, telephonic communications in their local aspects. Far from preempting the field, Congress deliberately and consciously sought to save the states the right to continue to protect their local interests.

Assuming, then, that Section 605 permits reasonable state legislation to aid in local law enforcement, the provisions of the New York Constitution and Code of Criminal Procedure, under which the police officers acted here, are reasonable by any standards. The safeguard of a warrant from a court is obviously designed after the customary search warrant. It may be issued only on a showing of reasonable cause. The New York statute goes even further and imposes criminal penalties for interceptions by police officers not in accordance with its provisions.

— We urge that there is room under Section 605 for state laws granting specific authority to state officials to intercept telephone communications in aid of local

law enforcement, and that the particular New York constitutional and statutory provisions here involved are not illegal or nullified by Section 605 of the Communications Act.

ARGUMENT

I

THE EVIDENCE WAS ADMISSIBLE SINCE IT WAS OBTAINED BY STATE OFFICERS ENFORCING STATE LAW WITHOUT PARTICIPATION BY FEDERAL OFFICERS

In this case, New York City police, acting under a warrant issued by a New York court pursuant to the New York Constitution and Code of Criminal Procedure, obtained information which gave them probable cause to stop and search an automobile. The search revealed evidence of a federal crime which was turned over to federal authorities. In the ensuing prosecution in the federal court, the evidence was received over the objection of the petitioner that it was obtained as a result of wiretapping. Admittedly, the federal government had no knowledge that there had been wiretapping until defense counsel brought out the fact on cross-examination (Pet. Br. 18). It had not participated in any way in the interception of the message; it had not joined in the search; and it did not divulge, or induce the divulgence of, the telephone messages or their contents. Therefore, there is no basis whatsoever for petitioner's assertion (Br. 21) that the government is engaged in "dirty business." Rather, the case presents simply the issue of whether evidence obtained as the result of wire-

tapping by state officers, acting pursuant to court order and state law, should be excluded from the federal courts under Section 605 of the Federal Communications Act.

The issue thus presented is discussed at pages 26-31 of the brief for the United States in *Rathbun v. United States*, No. 30, this Term, which is to be argued immediately prior to this case.¹ We do not repeat the entire argument here.

In *Weeks v. United States*, 232 U. S. 383, 398, the Court held that it was not error to permit the use in a federal trial of papers and property improperly seized by state policemen, as distinguished from those seized by a United States marshal, for "it does not appear that they acted under any claim of Federal authority * * *". In *Byars v. United States*, 273 U. S. 28, 33, the Court said:

We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

And in *Lustig v. United States*, 338 U. S. 74, 78-79, it was explained that a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

¹ The facts in the *Rathbun* case differ from the facts here in that the police there involved listened on an extension telephone at the invitation of one of the parties to the communication, but without court order. Also, the government sought to introduce into evidence the contents of the very messages which were overheard, rather than merely evidence discovered by tracing down leads contained in the messages.

The rationale which limits the federal exclusionary rule, as to searches and seizures, to federal officers applies to wiretapping as well. While the protection accorded telephone conversations arises from Section 605, and not from the Fourth Amendment, the kind of privacy protected by the former is similar to that preserved by the latter. *Nardone v. United States*, *supra*, 308 U. S. 338, 340-341; *Goldstein v. United States*, *supra*, 316 U. S. 114, 120-121. Just as the states need not, under the Fourth and Fourteenth Amendments, adopt the exclusionary rule as to evidence illegally seized, so, under Section 605, the states need not exclude evidence obtained by wiretapping. *Schwartz v. Texas*, 344 U. S. 199. Similarly, just as the Fourth Amendment and the *Weeks* rule do not require that federal courts exclude evidence unlawfully seized by state officers enforcing state law, Section 605 and the *Nardone* rule do not require that federal courts exclude evidence obtained by wiretapping by state officers enforcing state law. Since the evidence may be used in state proceedings under the *Schwartz* case, state officers will not be deterred from engaging in wiretapping by an exclusionary rule as to federal prosecutions when their purpose, as here, is solely to enforce local laws. Hence, wiretap evidence obtained by state officers without federal participation should be admitted in federal courts since the object of exclusion as to federal officers does not apply in such cases.

There is no substance to the two arguments presented by the petitioner to distinguish the admissibility of evidence illegal by reason of Section 605 of

the Communications Act from evidence obtained in violation of the Fourth Amendment. The first distinction suggested is that with respect to illegal searches the Fourth Amendment is inapplicable to state officials, while the prohibition of the interception of telephone messages applies to everyone (Pet. Br. 7-11). The difficulty with this distinction is not only that this Court has held that illegal searches by state officials may infringe the Fourteenth Amendment, *Wolf v. Colorado*, 338 U. S. 25, but also that the very assumption of this Court's seizure cases is that the action of the state officials was illegal; nevertheless, the evidence was held admissible at the federal trial. See *Lustig v. United States*, 338 U. S. 74, 77, 80; *Byars v. United States*, 273 U. S. 28, 29; *Burdeau v. McDowell*, 256 U. S. 465, 472, 475; *Weeks v. United States*, 232 U. S. 383, 398. Thus, the cases cannot be properly distinguished on the absence of illegality.

The second purported distinction is based on the proposition that the actual testifying by the witness was in violation of Section 605, as a divulgence of an intercepted communication from the witness stand. Whatever weight might be given this argument in a case where an attempt is made to introduce in evidence the contents of an intercepted message, it has no applicability here.² Not only did the Assistant United

² Under the language of Section 605, *supra*, pp. 2-3, both interception and divulgence are essential to a violation. Thus, the federal government, which by hypothesis was here entirely innocent of participation in the interception, cannot be guilty of violating the act when it produces in court evidence which came into its hands innocently. Moreover, there must have been a

States Attorney not seek to prove "the existence, contents, substance, purport, effect, or meaning" of intercepted messages, he did not even know of the existence of the messages themselves. The messages themselves formed no part of the government's case. The most that can be said is that the government's evidence at the trial came from tracing down the leads supplied by the intercepted messages. The holding in the second *Nardone* case, 308 U. S. 338, is certainly not to the effect that such traced-down evidence is itself in violation of Section 605. On analogy to *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, that case required the exclusion of evidence obtained by following leads obtained by illegal interception, in order to give full effect to the exclusion of the intercepted message itself. But neither the decision nor the opinion purported to hold that the giving of such secondary evidence in court would be a divulgence prohibited and punishable by the Communications Act.

Basically, the argument that evidence illegally seized may be introduced in evidence, while that obtained through interception of telephone communications may not, presents the odd concept that somehow a Constitutional prohibition is to be given less dignity than a statutory one (Cf. L. Hand C. J. in *United States v. Goldstein*, 120 F. 2d 485, 490 (C. A. 2), affirmed, 316 U. S. 114). We urge that the basis

divulgence prior to the trial in order to bring the evidence into the hands of the government which did not participate in the interception. The Communications Act certainly could not be meant to apply to repetitions of information once divulged.

for permitting the introduction in federal trials of evidence illegally seized by state officials is valid and that, for the same reason, the evidence introduced below was properly received.

II

SECTION 605 OF THE COMMUNICATIONS ACT IS PROPERLY CONSTRUED NOT TO FORBID INTERCEPTIONS BY STATE OFFICIALS PURSUANT TO COURT ORDER AND IN ACCORDANCE WITH STATE LAW.

A. A FEDERAL LAW SHOULD NOT BE CONSTRUED TO NULLIFY BY IMPLICATION A STATE LAW REGULATING ITS INTERNAL AFFAIRS.

If the New York City police, acting pursuant to a warrant issued by a state court, could legally intercept the telephone communications to and from the Reno Bar, then the trial court was entirely justified in accepting the evidence entirely apart from the argument set forth in Point I, *supra*. However, the court below held that because of the supremacy of federal law, Section 605 of the Communications Act took precedence over the New York law. We urge that, in view of the reluctance of the Court to interpret a federal law as nullifying by implication a state enactment, the Communications Act should be interpreted to permit both laws to stand.

We are dealing here with intergovernmental relations where it is important that each sovereign be permitted to act with as little restriction as possible within its field of jurisdiction so long as no undue interference is caused to the jurisdiction of the other. In line with this policy, the courts have repeatedly held that federal laws of apparently general application should not be construed to outlaw state action

which would otherwise be within state jurisdiction. Thus, in an early case before the Circuit Court for the Third Circuit, *United States v. Hart*, 1 Pet. C. C. 390, the question was whether a city official of Philadelphia could enforce traffic regulations against a carrier of the United States mails in spite of a statute prohibiting interference with the mail. Although the federal law contained no exception, Justice Washington construed the act as not preventing such action, stating at pages 392-393:

The second question will depend upon the fair construction of the act of Congress, and we are of opinion that it ought not to be so construed as to shield the carrier against this preventive remedy, because a temporary stoppage of the mail may be the consequence. Suppose the officer had a warrant against a felon who had placed himself in the stage, or that the driver should commit murder in the street in the presence of an officer, and then place himself on the box; could it be contended, that the sanctity of the mail would extend to protect those persons against arrest, because a temporary stoppage of the mail would be the consequence?—we think not. It could not be said in any of those cases, that the act amounted to a wilful stoppage of the mail.

The Supreme Judicial Court of Massachusetts adopted the same view in *Commonwealth v. Clason*, 229 Mass. 329.

More recently, in *Penn Dairies v. Milk Control Commission*, 318 U. S. 261, this Court had before it and act of Congress requiring competitive bidding in the purchase of supplies for the Army. The question was whether this prevented the application of Pennsylvania law and regulations fixing minimum prices for milk. The Court held that it did not, saying at pages 274-275:

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication * * * should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

And, in dealing with the same section of the Communications Act which is now before the Court, this Court was called on in *Schwartz v. Texas*, 344 U. S.

199, to construe it with reference to a Texas statute permitting the use in criminal trials of evidence obtained in violation of federal law. The Court held the state law not invalid (pp. 202-203).

Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

See also *Atchison, T. & S. F. R. Co. v. Railroad Commission*, 283 U. S. 380, 392-393; *Savage v. Jones*, 225 U. S. 501, 533; *Reid v. Colorado*, 187 U. S. 137, 148.

When this principle is applied to the relationship of Section 605 of the Communications Act to Article 1, Section 12, of the New York Constitution and Section 813-a of the New York Code of Criminal Procedure (*supra*, pp. 3-4), the question must be whether it clearly appears that Congress intended to prevent the New York courts from authorizing New York officials to intercept telephone calls in New York for the purpose of enforcing New York laws. An ex-

amination of the Communications Act as a whole demonstrates that Congress had no such intention.³

B. CONGRESS, IN THE COMMUNICATIONS ACT GENERALLY, RECOGNIZED THE INTEREST OF THE STATES IN TELEPHONE COMMUNICATIONS AND MADE PROVISION FOR STATE REGULATION

In enacting the Federal Communications Act, Congress created the Federal Communications Commission and brought radio, telephone, and telegraph communications under a single federal regulatory agency for the first time. 47 U. S. C. 151. However, Congress recognized at that time that a good deal of telephone communication is essentially a local matter. As stated by Senator Dill, Chairman of the Senate Committee on Interstate Commerce, who introduced the bill: "Ninety-eight percent of the telephone business of this country is within the States." 78 Cong. Rec. 4139. Therefore, Congress carefully preserved areas of state regulation throughout the enactment. For example, 47 U. S. C. (1952 ed.) 152 (b) provides that nothing in Chapter I of the Act [which stated the purpose of the Act, set up the federal commission (47 U. S. C. 151), stated the jurisdictional scope and application of the Act (47 U. S. C. 152), and defined

³*Weiss v. United States*, 308 U. S. 321, is not to the contrary. That case holds that Section 605 of the Communications Act applies to intrastate communications as well as interstate ones. But the Court was there dealing with interceptions made without specific statutory authority, not interceptions made pursuant to the warrant of a state court. It by no means follows that interceptions authorized by state law are likewise covered by the statute.

its terms (47 U. S. C. 153)] should be construed to give the commission jurisdiction over the charges, classifications, practices, services, facilities, or *regulations for or in connection with* the intrastate telephone communication service of *any* carrier. In addition, carriers who were engaged in interstate commerce solely through connection with a separate interstate carrier were completely exempt from federal control.

Senate Report No. 781, 73rd Cong., 2d Sess., p. 3, which accompanied the Communications Act in the Senate, stated that this section "* * * reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication." Senator Dill touched on this matter, saying, "We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic." 78 Cong. Rec. 8823. House Report No. 1850, 73rd Cong., 2d Sess., p. 4, was to the same effect.

The 1954 amendments reenforced the Congressional policy as to the exemption of intrastate telephone communications and intrastate carriers from federal commission control. With reference to the amendment (April 27, 1954, c. 175, § 1, 68 Stat. 63) permitting intrastate carriers to use radio links with interstate carriers without becoming subject to the act, Senate Report 1090, 83rd Cong., 2d Sess. (repeating the substance of the House Report), which accompanied the amendment, said (pp. 1-2):

The purpose of the legislation is to clarify the provisions of the Federal Communications Act with regard to the jurisdiction of the Federal Communications Commission over tele-

phone and telegraph companies which are engaged primarily in intrastate activities and which therefore, should be subject to State and local regulation rather than Federal regulation. * * * The legislation is designed to make certain that the use of radio will not subject to Federal regulation companies engaged primarily in intrastate operations.

The Federal Communications Commission, commenting on this amendment, said (p. 3): "Specifically, it would amend section 2 (b) (1) of the act to make explicit that intrastate communication service, whether 'by wire or radio', will not be subject to the Commission's jurisdiction over charges, classifications, practices, services, or facilities."

47 U. S. C. 221 is another instance in which Congress demonstrated an intent to permit state regulation to displace federal control. As originally enacted (see 47 U. S. C. (1952 ed.) 221), subsection (a) provided that nothing in the subsection should be construed as limiting the power of the States to regulate telephone companies. Subsection (b) provided that nothing in the chapter dealing with common carriers was to be construed to apply to, or give the Commission jurisdiction over, the charges, classifications, practices, services, facilities, or regulations for or in connection with telephone exchange service, even though a portion of the service was interstate, where such matters were subject to State or local regulation.

Senator Dill, in referring both to this section and 47 U. S. C. 152, *supra*, said:

We have attempted, in this proposed legislation, to safeguard State regulation by certain

provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply. * * * [78 Cong. Rec. 8823].

Senator Clark, in proposing an amendment to section 221 which was accepted by Senator Dill and agreed to by the Senate, observed:

Every one of these independent telephone lines throughout the United States is already subjected to local regulation by the State public-service commission, and to subject them to further regulation * * * would simply mean an intolerable burden * * *. [78 Cong. Rec. 8846].

Pertinent Congressional reports also disclose an intent to permit State commissions to regulate even interstate communications in limited areas. Senate Report No. 781, 73d Cong., 2d Sess., p. 5, House Report No. 1850, 73d Cong., 2d Sess., p. 7. Sections 152 and 153 (c) (the definition of interstate communication) make it plain that traffic within a metropolitan exchange which gives service across state lines is not deemed interstate solely because the boundaries of the metropolitan exchange do not coincide with state boundaries. For example, these sections do not apply to the New York and Washington, D. C. metropolitan exchanges which extend beyond state lines, *i. e.*, to New Jersey or Maryland. As Senator Dill stated on the floor of the Senate, 78 Cong. Rec. 8823:

* * * We have in mind, for instance, cases where a city has telephone service connecting into a number of States, such as we have right

here in Washington, running out into Maryland and out into Virginia, and in New York the service runs into New Jersey, and I think perhaps into Connecticut, though I am not sure about that. There are many cases in the country where, without some saving clause of that kind, the State commissions might be deprived of their power to regulate; and the State commission representatives were jealous, in the preparation of this bill, that those rights should be protected; and we have attempted to do that.

The metropolitan exchanges serving the Kansas City, Missouri-Kansas City, Kansas, area, and the Texarkana, Arkansas-Texarkana, Texas-Wakefield Village, Texas, area have been held to stand on the same footing. *General Tel. Co. of the Southwest v. Robinson*, 132 F. Supp. 39 (E. D. Ark.); *Southwestern Bell Tel. Co. v. United States*, 45 F. Supp. 403 (W. D. Mo.).

It is thus evident that Congress, in enacting the Federal Communications Act, created a scheme of regulation which would be complementary in its operation to that of the states, and not exclusive. The language and legislative history reveal that Congress envisioned a dual regulation of the telephone communications field—federal and state regulatory bodies active, each in its own sphere.¹

¹In *Snyder v. United States*, 351 U. S. 916; this Court affirmed a holding by the Ninth Circuit that certain information obtained by Federal Communication Commission employees while monitoring broadcasts by a farm radio station which was not properly licensed could be received in evidence in a federal court. Since the Court order is *per curiam*, the reasoning behind the affirmance is not evident. However, the government argued in that case that a reading of the Act as a whole

It recognized, as it has in other fields, that the regulation of local utility business is primarily the concern of the state. See *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341, 345-346; *North Carolina v. United States*, 325 U. S. 507, 511; *Palmer v. Massachusetts*, 308 U. S. 79; *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507, 519; *Interstate Natural Gas Co. Inc. v. Federal Power Commission*, 331 U. S. 682, 690.

In the light of the consideration thus given by Congress to the interests of the states in telephone communication, it appears that there was no intention to preempt the communications field for federal regulation, so as to preclude the states (as has New York) from enacting reasonable measures governing the interception and divulgence of telephone communications by local officers enforcing local law. Judged by the criteria of supersession summarized in *Pennsylvania v. Nelson*, 350 U. S. 497, 502-509 (See also *Hines v. Davidowitz*, 312 U. S. 52), New York's law does not trench on the field occupied by the federal law. The scheme of federal regulation of communications, by its very terms, permits state regulation of intrastate telephone communications and even of a portion of interstate telephone calls. An ascertainable line of demarcation has been drawn by Congress. It therefore cannot be said that telephone

made it clear that Congress intended to permit monitoring of broadcasts by Commission employees and that therefore Section 605 should not be read as outlawing such activity. The argument was in that respect similar to that here presented.

communication represents a field where the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject.

It follows that, since Congress has recognized intrastate telephone communication as a matter primarily of state concern, Section 605 should not be interpreted as preventing the people of a state from adopting the measures which they regard as necessary to their program of law enforcement. Our system of dual sovereignty confers responsibility for ordinary law enforcement primarily on the states. Congress, in regulating telephone communications, has recognized the interest of the states in that field. The combination of the various state interests involved in this problem suggests that only the clearest expression of Congressional intent should be permitted to prevent a state from adopting reasonable measures with respect to interception in aid of local law enforcement. Section 605 is not, we submit, that clear expression of Congressional intent to preempt the field which would prevent a state from adopting the kind of constitutional amendment and statute which New York has adopted and maintained since 1938.⁵

C. THE NEW YORK LAW, WHICH SURROUNDS PERMISSION TO WIRETAP WITH THE SAFEGUARDS NECESSARY TO SECURE A WARRANT UNDER THE FOURTH AMENDMENT, IS REASONABLE STATE REGULATION

If the states do have any authority to act in the field of telephone interception, then the New York

⁵ It is of some significance that New York deliberately adopted these provisions after Section 605 of the federal Act had been on the books for some time.

legislation is clearly reasonable and would survive any attack on Fourteenth Amendment grounds. It is not even necessary to justify the legislation under the doctrine of *Olmstead v. United States*, 277 U. S. 438, which held that wiretapping does not constitute an unreasonable search and seizure. The New York constitution and statute surround permission to wiretap with the safeguards necessary to secure a warrant to search under the Fourth Amendment to the Constitution, apparently recognizing that the privacy violated by a search is akin to that violated by wiretapping. *Nardone v. United States*, 308 U. S. 338, 340-341; *Goldstein v. United States*, 316 U. S. 114, 120-121. The New York Constitution deals with both searches and wiretapping in Article 1, Section 12. Thus, the first paragraph forbids unreasonable searches and seizures and sets out the manner in which reasonable searches may be undertaken. The second paragraph, quoted *supra*, p. 3, provides that telephone interceptions may be made only on the basis of a warrant issued after an *ex parte* judicial hearing by a state court of general jurisdiction. Standards which must be met at this hearing are set out, just as in regard to search and seizure, and other safeguards are provided by the statute to insure that indiscriminate wiretapping will not ensue.

New York courts require that more than lip service be paid to these enactments. See *Application For Order Permitting Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612. And Section 813-b, New York Code of Crim-

inal Procedure, as added by New York Law of April 23, 1957, c. 879, provides that law enforcement officers who intercept telephone communications unlawfully shall be guilty of a felony." Accordingly, if the New York Constitution and statute are to be branded as illegal here, it can only be because of inevitable and irreconcilable conflict with the federal statute. For the reasons set forth above, we think there is no such irreconcilable conflict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,

Solicitor General.

RUFUS D. MCLEAN,

Acting Assistant Attorney General.

JOHN F. DAVIS,

Assistant to the Solicitor General.

BEATRICE ROSENBERG,

EUGENE L. GRIMM,

Attorneys.

OCTOBER 1957.

"§ 813-b. • *Vulgarful wiretapping by law enforcement officers*

"Any law enforcement officer, not being a sender or receiver of a telephonic communication, who wilfully and by means of instrument intercepts, overhears or records a telephonic communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof, and without an order as provided for under section eight hundred thirteen-a of this code, shall be guilty of a felony punishable by imprisonment for not more than two years."